92-1052

NO. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LEON SANDERS,

Petitioner,

VS.

LEO SAMANIEGO,
Sheriff of El Paso County, Texas

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Counsel of Record:
Randolph L. Schaffer, Jr.
Schaffer, Lambright, Odom & Sparks
1301 McKinney, Suite 3100
Houston, Texas 77010
(713) 951-9555

Counsel for Petitioner,
Leon Sanders

QUESTIONS PRESENTED

1. Whether a defendant in a criminal case waives his double jeopardy protection to preclude retrial based on insufficient evidence at his initial trial if his conviction is reversed on other grounds.

2. Whether retrial is barred following a post-conviction reversal for prosecutorial misconduct if retrial would be barred following the granting of a mistrial for the same misconduct.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

APPLICABLE CONSTITUTIONAL PROVISION . 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I. Certiorari should be granted to resolve whether a defendant in a criminal case waives his double jeopardy protection to preclude retrial based on insufficient evidence if his conviction is reversed on other grounds . . . 6

II. Certiorari should be granted to resolve whether retrial is barred following a post-conviction reversal for prosecutorial misconduct if retrial would be barred following the granting of a mistrial for the same misconduct 16

CONCLUSION 27

TABLE OF AUTHORITIES

Page

Cases

Burks v. United States,
437 U.S. 1
(1978) 13-14,15,24

Commonwealth v. Marconi,
490 A.2d 871 (Pa. Super. 1985),
pet. denied, 518 A.2d 542
(Pa. 1986) 12

Delk v. Atkinson, 665 F.2d 90
(6th Cir. 1981) 11,12

Evans v. Court of Common Pleas,
959 F.2d 1227
(3d Cir. 1992) 13

Ex Parte Sanders, 771 S.W.2d 645
(Tex. App. - El Paso 1989,
pet. ref'd.) 5

Ex Parte Sanders, 801 S.W.2d 955
(Tex. App. - El Paso 1990,
pet. ref'd.) 5

Greene v. Massey, 437 U.S. 19
(1978) 14,24

McNair v. Hayward, 666 P.2d 321
(Utah 1983) 12

Oregon v. Kennedy,
456 U.S. 667 (1982) . . . 21,22,27

Richardson v. United States,
468 U.S. 317 (1984) 10,12

Sanders v. Lynaugh,
714 F.Supp. 834
(W.D. Tex. 1988) 4,18

Sanders v. State,
No. 8-82-32-CR (Tex. App.
- El Paso 1983, pet. ref'd.) . . . 4

United States v. Curtis,
683 F.2d 769 (3d Cir.),
cert. denied, 459 U.S. 1018
(1982) 21

United States v. Douglas,
874 F.2d 1145 (7th Cir.),
cert. denied, 493 U.S. 841
(1989) 13

United States v. Haddock,
961 F.2d 933
(10th Cir. 1992) 12

United States v. Miller,
952 F.2d 866 (5th Cir.),
cert. denied, 112 S.Ct. 3029
(1992) 9,10,13

United States v. Porter,
807 F.2d 21 (1st Cir. 1986),
cert. denied, 481 U.S. 1048
(1987) 12

United States v. Rios,
637 F.2d 728 (10th Cir. 1980),
cert. denied, 452 U.S. 918
(1981) 21

United States v. Roberts,
640 F.2d 225 (9th Cir.),
cert. denied, 452 U.S. 942
(1981) 21

United States v. Singleterry,
683 F.2d 122 (5th Cir.),
cert. denied, 459 U.S. 1021
(1982) 20

United States v. Szado,
912 F.2d 390 (9th Cir.
1990) 11-12

United States v. Wallach,
979 F.2d 912 (2d Cir. 1992),
cert. pending,
No. 92-1437 21,22,23

Statutes and Constitutions

28 U.S.C. §1254(a) 2

28 U.S.C. §2254 2

U.S. CONST. amend. V 2

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LEON SANDERS,

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On Petition for Writ of Certiorari to the
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for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinions of the Fifth Circuit (Appendix A) and of the district court (Appendix B) are unreported.

STATEMENT OF JURISDICTION

The opinion and judgment of the Fifth Circuit were entered on March 12, 1993. This court has jurisdiction under 28 U.S.C. §1254(1) and Supreme Court Rule 10.1. The basis for federal jurisdiction in the district court was 28 U.S.C. §2254.

APPLICABLE CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution:

> ... nor shall any person be subject for the same offence to be twice put in

jeopardy of life or limb;
...

STATEMENT OF THE CASE

On February 12, 1980, petitioner was charged with the murder of Ismael Rivera. A jury empaneled to determine his competency to stand trial found that he was incompetent and that there was no substantial probability that he would attain competency within the foreseeable future. On October 6, 1980, the trial court committed him to a state psychiatric hospital.

On June 3, 1981, a jury rejected uncontroverted expert testimony that petitioner was insane, convicted him of murder, and assessed his punishment at 50 years in prison. The Court of Appeals affirmed the conviction in an unpublished

opinion and the Court of Criminal Appeals denied discretionary review. **Sanders v. State, No. 8-82-32-CR (Tex. App. - El Paso 1983, pet. ref'd.).**

On September 21, 1988, the United States District Court for the Western District of Texas granted habeas corpus relief on the basis that petitioner was denied due process of law and a fair trial because the prosecutor repeatedly and inaccurately argued to the jury that petitioner would be "cut loose" if the jury found him not guilty by reason of insanity. **Sanders v. Lynaugh, 714 F.Supp. 834 (W.D. Tex. 1988).**

On remand, petitioner filed an application for writ of habeas corpus seeking to preclude a retrial on the basis that no rational trier of fact could have found that he was sane. The

trial court denied relief, the Court of Appeals affirmed, and the Court of Criminal Appeals denied discretionary review. **Ex Parte Sanders, 771 S.W.2d 645 (Tex. App. - El Paso 1989, pet. ref'd.).**

Petitioner then filed a second application for writ of habeas corpus seeking to preclude a retrial on double jeopardy grounds relating to prosecutorial misconduct. The trial court denied relief, the Court of Appeals affirmed, and the Court of Criminal Appeals denied discretionary review. **Ex Parte Sanders, 801 S.W.2d 955 (Tex. App. - El Paso 1990, pet. ref'd.).**

Having exhausted state remedies on both issues, petitioner filed a petition for writ of habeas corpus of a person in state custody in the United States District Court for the Western District

of Texas. On September 11, 1992, the district court denied relief. On March 12, 1993, the United States Court of Appeals for the Fifth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted to resolve whether a defendant in a criminal case waives his double jeopardy protection to preclude retrial based on insufficient evidence if his conviction is reversed on other grounds.

On February 12, 1980, petitioner stabbed Ismael Rivera to death. After his arrest, petitioner was examined by several psychiatrists and psychologists, who concluded that he was a severe and chronic schizophrenic. A jury empaneled

to determine his competency found that he was incompetent to stand trial and would remain so into the foreseeable future. Accordingly, he was committed to a state psychiatric hospital.

In June of 1981, petitioner was tried for murder. Two psychiatrists and one psychologist testified that at the time of the murder, petitioner was suffering from severe schizophrenia rendering him incapable of conforming his conduct to the requirements of the law and, that in reasonable medical probability, he was legally insane at that time. The State called no expert witnesses to rebut the testimony of the defense experts. Rather, the State relied on certain lay testimony that petitioner had engaged in purportedly "normal" behavior on the night of the murder. The jury convicted

petitioner of murder and sentenced him to 50 years in prison.

After the state courts affirmed the conviction on direct appeal, petitioner sought federal habeas corpus relief on the basis, inter alia, that the evidence established insanity as a matter of law and that the prosecutors engaged in misconduct by repeatedly and inaccurately arguing during summation that petitioner would be "cut loose" if acquitted by reason of insanity. The federal district court granted habeas corpus relief on the basis of prosecutorial misconduct but declined to address the sufficiency of the evidence.

On remand, petitioner filed an application for writ of habeas corpus seeking to preclude a retrial on the basis that no rational trier of fact

could have found that he was sane. The state courts addressed the merits and denied relief, as did the federal district court. However, the Fifth Circuit declined to address the merits on the basis of **United States v. Miller, 952 F.2d 866 (5th Cir.), cert. denied, 112 S.Ct. 3029 (1992)**, which held that a criminal defendant may not raise a double jeopardy claim based on insufficient evidence presented at the initial trial in attempting to prevent a retrial if the defendant failed to secure a ruling of insufficient evidence on his first appeal. Even if the evidence at the defendant's initial trial was insufficient to support his conviction, he could not raise the claim of insufficient evidence as a double jeopardy bar to retrial unless an

appellate court reviewing the original conviction found the evidence constitutionally insufficient.

Miller relied on **Richardson v. United States, 468 U.S. 317 (1984)**, which held only that a defendant could not bar retrial based on insufficient evidence where the trier of fact at the initial trial never returned a verdict. In **Richardson**, the initial trial ended in a hung jury so the original jeopardy never terminated. In **Miller**, the Fifth Circuit equated the post-verdict granting of a new trial with a mistrial occasioned by a hung jury. This court did not address that issue in **Richardson**. Thus, **Richardson** does not support the proposition on which **Miller** relied.

The federal circuit courts of appeals are divided on this issue. In the

typical situation, a defendant has challenged his conviction on the basis of both insufficient evidence and trial error, has obtained a new trial based on trial error without appellate consideration of the sufficiency of the evidence, and on remand, has sought to bar retrial on double jeopardy grounds based on insufficient evidence. Some courts of appeals have permitted the defendant to challenge the sufficiency of the evidence before retrial on double jeopardy grounds. **Delk v. Atkinson, 665 F.2d 90 (6th Cir. 1981);**[1] **United States**

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[1] The state supreme court held that the evidence was sufficient but reversed the conviction based on trial error. The defendant petitioned the federal court to bar retrial based on insufficient evidence. The Sixth Circuit held that when a state court upholds the sufficiency of the evidence, but orders a new trial based on trial error, the defendant may seek to prevent retrial on double jeopardy grounds in a federal

v. Szado, 912 F.2d 390 (9th Cir. 1990); United States v. Haddock, 961 F.2d 933, 934, n. 1 (10th Cir. 1992).[2] Other courts of appeals have declined to do so based on **Richardson. United States v. Porter, 807 F.2d 21 (1st Cir. 1986), cert. denied, 481 U.S. 1048 (1987);**

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habeas corpus proceeding. If the evidence at trial was legally insufficient, he should have been acquitted, and to expose him to a retrial would violate double jeopardy. **665 F.2d at 92.**

[2] See also **McNair v. Hayward, 666 P.2d 321 (Utah 1983)** (Even though the trial court granted a motion for new trial based on trial error, the defendant could seek to preclude retrial based on insufficient evidence.); **Commonwealth v. Marconi, 490 A.2d 871 (Pa. Super. 1985), pet. denied, 518 A.2d 542 (Pa. 1986).** (The court interpreted **Richardson** as indicating that a review of the sufficiency of the evidence would be necessary if "the sufficiency of the evidence, rather than the circumstances surrounding the mistrial, was the proper focus for the appellate court's double jeopardy inquiry." **490 A.2d at 876, n. 9.**)

United States v. Douglas, 874 F.2d 1145 (7th Cir.), cert. denied, 493 U.S. 841 (1989); Evans v. Court of Common Pleas, 959 F.2d 1227 (3d Cir. 1992); United States v. Miller, supra.

For many years, a defendant whose conviction was reversed on direct appeal for insufficient evidence was subject to retrial. Defendants unsuccessfully argued that it should not matter which court granted the acquittal, as a determination of insufficient evidence should bar retrial on double jeopardy grounds. Otherwise, a defendant who should have been acquitted at trial but was improperly convicted was penalized because the appellate court, rather than the trial court, made the finding of insufficient evidence. It was not until 1978 that this court agreed in **Burks v.**

United States, 437 U.S. 1 (1978) and **Greene v. Massey, 437 U.S. 19 (1978)**. Before 1978, numerous defendants were retried, improperly convicted, and served prison sentences.

In **Burks**, this court alluded to the present issue in dictum. "In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial." **437 U.S. at 17.** It follows that petitioner did not waive the right to have the sufficiency of the evidence reviewed following his conviction by simultaneously asserting his procedural right to request a new trial based on trial error. Indeed, petitioner

requested that the federal district court grant habeas corpus relief based on insufficient evidence, but the district court opted to grant relief based on prosecutorial misconduct.

The ultimate issue is whether a defendant in a criminal case waives the right to have the sufficiency of the evidence reviewed following his conviction by also asserting his procedural right to request a new trial based on trial error. This court has never expressly resolved the issue, although the dictum in **Burks** would indicate that there is no waiver. A defendant who is improperly convicted on legally insufficient evidence should be able to bar a retrial on double jeopardy grounds even though he has been granted a new trial based on trial error. This

court should grant certiorari to resolve the conflict in the circuit courts of appeals on this significant issue.

II. Certiorari should be granted to resolve whether retrial is barred following a post-conviction reversal for prosecutorial misconduct if retrial would be barred following the granting of a mistrial for the same misconduct.

During the voir dire examination of the jury panel, several veniremen inquired whether a person found not guilty by reason of insanity was committed to a mental institution. The court refused to allow defense counsel to explain the availability of civil commitment proceedings for a person acquitted by reason of insanity, and

instead advised the panel that the jury could not consider what might happen to such a person.

At trial, petitioner presented three experts who testified that he was insane at the time of their respective examinations and at the time of the offense. The State did not present any expert or qualified lay opinion testimony in rebuttal.

During summation, the prosecutors repeatedly and inaccurately argued that petitioner would be "cut loose" if acquitted by reason of insanity, and concluded the summation by advising the jury, "If you want to give this man a license to kill, then cut him loose because he can use that disease for the rest of his life if he wants to." The

trial court overruled a defense objection.

The federal district court subsequently granted habeas corpus relief, concluding that the arguments denied petitioner due process of law and a fair trial, as they "constituted a repeated and persistent attempt to suggest to the jury that the effect of a verdict of not guilty by reason of insanity would be to allow the petitioner to walk the streets in complete freedom [which] ... was a misstatement of the law in Texas." **Sanders v. Lynaugh, 714 F.Supp at 837.**

On remand, petitioner filed an application for writ of habeas corpus seeking to preclude a retrial on double jeopardy grounds relating to prosecutorial misconduct. At an

evidentiary hearing, the prosecutor testified that he did not "have any question" that petitioner was medically insane; that he recognized the difficulty in convincing the jury that petitioner was sane based on lay testimony alone in view of the uncontroverted expert testimony of insanity; that he knew that if petitioner was acquitted by reason of insanity, the court was required to refer him for civil commitment proceedings; and, that before summation, the prosecutors made a conscious strategic decision to make the "cut loose" arguments even though they recognized that the trial court had previously refused to allow petitioner to explain the availability of civil commitment proceedings for a defendant acquitted by reason of insanity. The intent in making

the argument was to obtain a conviction as opposed to a mistrial. When the court overruled petitioner's objection to the first "cut loose" argument, the prosecutor realized that the court was receptive, so he repeated the argument three times because petitioner had presented a "strong insanity defense" and the prosecutor did not want the jury to rely upon the expert testimony of insanity in deciding the case.

The Fifth Circuit declined to address the merits of petitioner's claim based on circuit precedent holding that prosecutorial misconduct can operate as a double jeopardy bar to retrial only if the trial court declared a mistrial. **United States v. Singleterry, 683 F.2d 122 (5th Cir.), cert. denied, 459 U.S. 1021 (1982).**

The federal circuits courts of appeals are divided on this issue. Several have held that the double jeopardy considerations applicable after a mistrial has been granted in the trial court are equally applicable where the trial court denied the mistrial but an appellate court reversed the conviction due to prosecutorial misconduct. **United States v. Rios, 637 F.2d 728 (10th Cir. 1980), cert. denied, 452 U.S. 918 (1981); United States v. Roberts, 640 F.2d 225 (9th Cir.), cert. denied, 452 U.S. 942 (1981)**; cf. **United States v. Curtis, 683 F.2d 769, 774 (3d Cir.), cert. denied, 459 U.S. 1018 (1982); United States v. Wallach, 979 F.2d 912 (2d Cir. 1992), cert. pending, no. 92-1437.**

In **Oregon v. Kennedy, 456 U.S. 667, 676 (1982)**, this court stated in dictum

that double jeopardy does not bar retrial of a defendant whose conviction is reversed on appeal on the same grounds as those sought in an unsuccessful mistrial motion. However, the Second Circuit recently observed in **Wallach** that "the Supreme Court might think that the Double Jeopardy Clause protects a defendant from retrial in some other circumstances where prosecutorial misconduct is undertaken with the intention of denying the defendant an opportunity to win an acquittal." **979 F.2d at 915.** Ultimately, that court concluded, "If any extension of **Kennedy** beyond the mistrial context is warranted, it would be a bar to retrial only where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed

at the time was likely to occur in the absence of his misconduct." **Id.** That is precisely what occurred in the case at bar.

The logic of petitioner's position is demonstrated by analogy to the evolution of the law on the issue of whether an appellate reversal for insufficient evidence creates a double jeopardy bar to retrial. Prior to 1978, if a trial court correctly granted an instructed verdict based on insufficient evidence, the defendant could not be retried. However, if the trial court incorrectly denied an instructed verdict, the jury convicted, and an appellate court reversed for insufficient evidence, the defendant could be retried. This made no sense, as it penalized the defendant because of the erroneous ruling of the trial court.

This court finally cured the inequity when it held that an appellate acquittal for insufficient evidence was entitled to the same dignity as a trial court acquittal, and barred retrial on double jeopardy grounds. **Burks v. United States, supra; Greene v. Massey, supra.** In explaining why double jeopardy concerns preclude retrial upon an appellate reversal for insufficient evidence, the court reasoned, "To hold otherwise would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the district court." **Burks v. United States, 437 U.S. at 11.**

Accordingly, for double jeopardy purposes, to determine whether the defendant may be retried after his first

trial has been thwarted due to intentional prosecutorial misconduct, whether that result obtains in the midst of trial or on appeal, the focus should be on the nature of the misconduct and not on which court grants relief. It is illogical to create a double jeopardy bar to retrial where the trial court correctly grants a mistrial due to misconduct, but to preclude same where the trial court incorrectly denies the relief requested. Had the trial court sustained the objection to the improper argument and granted a mistrial, petitioner clearly could have asserted that retrial was barred because the mistrial was occasioned by intentional prosecutorial misconduct. The same rule should apply where the "mistrial" in the form of a post-conviction reversal.

Otherwise, the defendant is penalized by being eligible for retrial just because the trial court erred when confronted with a proper defense objection to the prosecutorial misconduct. Trial courts should not be allowed to deny a legitimate motion for mistrial, secure in the knowledge that if there is an unjust conviction and an appellate court corrects the error, the defendant can still be retried, whereas if the trial court grants the mistrial, retrial may be barred. This court should grant certiorari to resolve the circuit conflict on this significant issue.[3]

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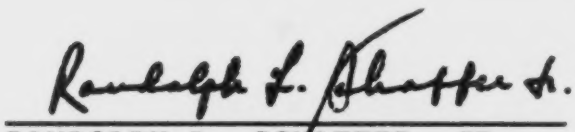
[3] In the event that the court grants certiorari and holds that retrial is barred following a post-conviction reversal for prosecutorial misconduct if retrial would be barred following the granting of a mistrial for the same misconduct, two additional issues must be resolved on remand to the Fifth Circuit. The first is whether double jeopardy

CONCLUSION

For all of the above reasons, this court should grant certiorari.

Respectfully submitted,



RANDOLPH L. SCHAFFER, JR.

1301 McKinney, Suite 3100
Houston, Texas 77010
(713) 951-9555

Counsel for Leon Sanders

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should preclude a retrial if the prosecutor engaged in misconduct designed to result in an unfair conviction or to avoid a likely acquittal, as opposed to provoking a mistrial. The second is whether improper argument made with the intent to obtain a conviction is the functional equivalent for double jeopardy purposes of an intent to provoke a mistrial under **Oregon v. Kennedy, supra.**

APPENDIX

APPENDIX

TABLE OF CONTENTS

	Page
A. Opinion of the Court of Appeals	1a
B. Opinion of the District Court	10a
C. Judgment of the Court of Appeals	23a
D. Order Staying Mandate	24a

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8515
Summary Calendar

LEON SANDERS,

Petitioner-Appellant,

v.

LEO SAMANIEGO,
Sheriff of El Paso County, Texas,

Respondent-Appellee.

Appeal from
the United States District Court
for the Western District of Texas
(EP-91-CV-126)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and

Leon Sanders, a state prisoner in the custody of the El Paso County Sheriff, Leo Samaniego, appeals from the district court's denial of Sanders' pre-trial habeas corpus petition seeking to bar the State of Texas from retrying Sanders for murder. Finding no error, we affirm.

I.

On February 12, 1980, Leon Sanders stabbed Ismael Rivera to death. After he was arrested, Sanders was examined by a number of psychiatrists and psychologists, who concluded that he was a severe and chronic schizophrenic. A jury empaneled to determine Sanders' competency found that he was incompetent

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burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

to stand trial and would remain so into the foreseeable future. Sanders was, thus, committed to a state psychiatric hospital in 1980. Over a year later, he was ultimately found competent to stand trial. A jury convicted Sanders of murder and sentenced him to fifty years' imprisonment. The Texas Court of Appeals affirmed his conviction in an unpublished opinion. Sanders thereafter sought habeas corpus relief.

In 1988, the federal district court for the Western District of Texas granted Sanders' first petition for habeas corpus, finding that the state prosecutor's remarks during the closing arguments at the guilt/innocence phase denied Sanders due process of law. See Sanders v. Lynaugh, 714 F. Supp. 834

(W.D. Tex. 1988).[2] Because the district court granted the writ on this ground, it saw no need to reach Sanders' claim that the State's evidence was insufficient to support a rational jury's finding that Sanders was sane at the time of the crime. See id. at 838. The court further held that its grant of the writ of habeas corpus on the prosecutorial misconduct claim did "not preclude a retrial on the Petitioner's case . . . ." Id. Neither the State nor Sanders appealed the district court's order. Rather, the case was remanded to the

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[2] In particular, the district court held that Sanders was denied due process by the prosecutor's repeated admonishment to jurors that if they found Sanders not guilty by reason of insanity they would be "cutting [him] loose" into society. Id., 714 F. Supp. at 836-37.

state trial court, permitting the State to decide whether to retry Sanders.

The State declared that it intended to retry Sanders for murder. Before the retrial could proceed, however, Sanders filed a plea in bar, arguing that the Double Jeopardy Clause prevented retrial. Sanders' double jeopardy argument was two-fold. First, he contended that because he presented evidence at the first trial to establish insanity "as a matter of law,"[3] Sanders' first trial should be treated as an acquittal for purposes of double jeopardy. Second, he argued, because the federal district

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[3] In making this argument, Sanders relied on Texas authority that holds that in certain cases involving uncontroverted expert testimony that a defendant was insane at the time of the crime, insanity is established "as a matter of law." See, e.g., Van Guilder v. State, 709 S.W.2d 178 (Tex.Crim.App. 1986).

court's issuance of the writ of habeas corpus was the "functional equivalent" of a declaration by the state trial court of a mistrial based on prosecutorial misconduct intended to provoke a mistrial, the State is barred from seeking a retrial under the Double Jeopardy Clause.[4] The state courts denied pre-trial habeas relief on these grounds, that the federal district court likewise denied Sanders' second writ of habeas corpus. The district court did, however, grant Sanders a certificate of probable of cause to appeal.

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[4] In making this argument, Sanders relied on the well-established rule that prosecutorial misconduct that intentionally provokes a mistrial bars retrial under the Double Jeopardy Clause. See Oregon v. Kennedy, 456 U.S. 667 (1982).

II.

On appeal to this court, Sanders reasserts his two-pronged double jeopardy argument. Because this circuit's precedent clearly forecloses his claims, we affirm the district court's denial of the writ of habeas corpus.

A. Double Jeopardy Based on the Sufficiency of the Evidence of Sanity

With respect to Sanders' argument that the evidence presented at his first trial established insanity "as a matter of law," we observe that the Texas Court of Appeals, on appeal from the state trial court's denial of pre-trial habeas relief, was willing to entertain Sanders' argument that double jeopardy would prevent retrial <u>if</u> the evidence at Sanders' original trial established "as a matter of law" that he was insane at

the time of the crime. See Sanders v. State, 771 S.W.2d 645, 649 (Tex.App.--El Paso 1989). The court simply found that "it appears that a rational jury could have properly concluded that [Sanders] was legally sane at the time of the offense." Id. The federal district court denied Sanders' petition for federal habeas relief for the same reason.

In United States v. Miller, 952 F.2d 866, 870-74 (5th Cir. 1992), cert. denied, 112 S. Ct. 3029 (1992), this court held that a criminal defendant may not raise a double jeopardy claim based on alleged insufficient evidence presented at his original trial in attempting to prevent a retrial, cf. Burks v. United States, 437 U.S. 1

(1978),[5] if the defendant failed to secure a ruling of insufficiency on his first appeal. That is, even if the evidence at a defendant's original trial was insufficient to support his conviction, the defendant cannot raise the insufficiency claim as a double jeopardy bar to a retrial unless a court reviewing the original conviction found the evidence constitutionally insufficient.[6] Furthermore, if the

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[5] In Burks, the Supreme Court held that the Double Jeopardy Clause bars retrial of a criminal defendant if an appellate court overturns the original conviction based on insufficient evidence.

[6] Although Miller was a federal criminal direct appeal, we see no reason not to apply its holding in the context of federal habeas review of a state criminal case. At least one other circuit had adopted this approach. See Evans v. Court of Common Pleas, 959 F.2d 1227 (3rd Cir. 1992). We also note, however, that at least one other circuit has rejected our position in Miller. See

defendant raised an insufficiency claim on the prior appeal, the rule in Miller still applies even if the previous appellate court or courts failed to address the sufficiency claim and instead reversed on other grounds. See Evans, 959 F.2d at 1229 (noting that original state appellate court rejected the defendant's insufficiency argument while reversing on other grounds).

In the instant case, Sanders raises an insufficiency claim based on the evidence presented at his first trial.[7] Because

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United States v. Haddock, 961 F.2d 933, 934 n.1 (10th Cir. 1992).

[7] Ordinarily, our review of such an insufficiency claim is based on the straight-forward standard enunciated in Jackson v. Virginia, 443 U.S. 307, 319-20 (1979) -- namely, whether a rational trier of fact could find every element of the charged offense beyond a reasonable doubt. The parties, however, have never mentioned the Jackson standard and have instead mainly cites cases concerning the

this is a habeas appeal -- albeit a pre-trial appeal -- concerning Sanders' retrial, we may not reach the merits of the insufficiency claim underlying his

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Texas standard governing proof of insanity.

Although we refuse to apply it in the instant case, we note that, in the context of an insanity defense, a federal court applying the standard in Jackson v. Virginia must first look to how state law treats the question of sanity at the time of the crime. In Texas, insanity is an affirmative offense, which the defendant must establish by the preponderance of the evidence. See Texas Penal Code § 8.01(a). A defendant's sanity -- a question which directly implicates the mens rea of murder, an essential element of the crime -- is a rebuttable presumption under Texas law. Thus, our sufficiency review in a Texas case in which the insanity defense was raised at trial simply asks whether, by a preponderance of the evidence, a rational jury could find the defendant sane at the time of the crime. See Fulghum v. Ford, 850 F.2d 1529, 1532-34 (11th Cir. 1988), cert. denied, 488 U.S. 1013 (1989) (Jackson review of insanity defense raised under Georgia law, which likewise requires a defendant affirmatively to establish insanity by a preponderance of the evidence).

double jeopardy claim. Although the district court thus erred in addressing the merits of this claim in the first place, we nevertheless affirm the court's denial of the writ.

B. Double Jeopardy Based on Prosecutorial Misconduct

In the second prong of Sanders' double jeopardy claim, he argues that we should treat the district court's grant of the habeas writ based on prosecutorial misconduct as the "functional equivalent" of a declaration of mistrial caused by calculated prosecutorial misconduct. The premise of Sanders' claim is the Supreme Court's decision in Oregon v. Kennedy, 456 U.S. 667 (1982), in which the Court held that double jeopardy bars retrial when a prosecutor intentionally provokes a mistrial. Sanders ignores that this

court has, for over a decade, limited the rule in Kennedy to cases in which a mistrial has actually been declared by the trial judge. See United States v. Singleterry, 683 F.2d 122 (5th Cir. 1982), cert. denied, 459 U.S. 1021 (1982); but see United States v. Roberts, 640 F.2d 225 (9th Cir. 1981); United States v. Rios, 637 F.2d 728 (10th Cir. 1980); cf. United States v. Curtis, 683

F.2d 769, 774 (3d Cir. 1982).[8] Thus, Sanders' claim must fail.

III.

For the foregoing reasons, we AFFIRM the district court's denial of the writ of habeas corpus.

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[8] In Singleterry, the defendant made an argument quite similar to Sanders'. We distinguished the narrow rule in Kennedy by noting, "under Kennedy, the double jeopardy clause is concerned only with prosecutorial misconduct that is intended to provoke a mistrial. When a mistrial is not declared, . . . the prosecutor's efforts have been unsuccessful. The dangers that the Kennedy exception was intended to prevent -- that the defendant might lose his 'valued right to complete his trial before the first jury' [citation omitted], and that the prosecutor might be seeking a more favorable opportunity to convict [citation omitted] -- are more attenuated when the defendant is convicted by the first jury but an appellate court reverses for prosecutorial misconduct. Singleterry, 683 F.2d at 124.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

LEON SANDERS,	)	
	)	
Petitioner	)	
	)	
v.	)	No. EP-91-CA-126-H
	)	
LEO SAMANIEGO, Sheriff of El Paso County, Texas,	)	
	)	
Respondent.	)	

ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS

This is a petition for a writ of habeas corpus by a state prisoner. It is actually the most recent in a long series of habeas corpus actions brought by the same Petitioner. On June 3, 1981, the Petitioner was convicted of murder in the 171st District Court of El Paso County, Texas. Punishment was assessed at fifty years imprisonment. In September, 1988, this Court granted a petition for a writ

of habeas corpus and ordered that Petitioner's case be remanded to the 171st District Court with instructions that he be afforded a new trial. **Sanders v. Lynaugh**, 714 F.Supp. 834, 838-39 (W.D. Tex. 1988). The new trial, however, has never been held. Instead, the Petitioner has filed an additional series of habeas corpus actions seeking to obtain his release without trial. It appears that he has exhausted state remedies, and that the present petition is properly before this Court for consideration on its merits.

The Petitioner first contends that retrial is barred on double jeopardy grounds because the evidence at his first trial established as a matter of law that he was legally insane at the time of the killing which resulted in his conviction

for murder. The Petitioner attempted to present this issue in his previous habeas corpus action in this Court, but the Court declined to rule on it, instead deciding the case on other grounds. **Sanders v. Lynaugh, supra** at 838. Now that the issue is presented again, the Court finds that it does not entitle the Petition to habeas corpus relief. Although there is substantial evidence of insanity at the time of the offense, evidence which Petitioner will undoubtedly present in the course of his retrial, this Court is unable to say as a matter of law that the State will be unable to produce sufficient evidence of sanity to create a fact question for the jury. Under Texas law, insanity is an affirmative defense, and the Petitioner in a retrial will have the burden of

proving by a preponderance of the evidence that as a result of a mental disease or defect he did not know that his conduct was wrong or that he was incapable of conforming his conduct to the requirements of the law. Tex. Penal Code, art. 8.01(a). Although at least two psychiatrists and one psychologist have diagnosed the Petitioner as being schizophrenic, they have acknowledged that at the time of the killing the Petitioner's condition could have been in remission and that he could have been able to distinguish right from wrong and to conform his conduct to legal requirements. Furthermore, in the first trial, the prosecution produced certain lay witnesses who testified to arguably "normal" behavior on the part of the Petitioner on the night the killing

occurred. Finally, it is at least theoretically possible that in a retrial, the State could produce additional evidence of sanity, either lay or expert. For example, the record shows that the Petitioner was committed to the Rusk State Hospital for several months in 1980. It is possible that witnesses or records from the state hospital might be offered in evidence at a retrial, and might have a bearing on the issue of the Petitioner's sanity at the time of the offense. Faced with conflicting evidence, the Court is unable to say as a matter of law that a rational jury could not reject the Petitioner's insanity defense and return a verdict of guilty.

The Petitioner also contends that the double jeopardy clause bars his retrial

in this case because the prosecutor in the first trial engaged in intentional misconduct. The Petitioner's first writ was granted in 1988 because the Court found that the Petitioner's due process rights were violated in his first trial by the prosecutor's improper and prejudicial argument. **Sanders v. Lynaugh, supra** at 837. In so ruling, however, this Court made a specific finding that the holding did not preclude a retrial of the Petitioner if the retrial were conducted in a manner consistent with due process. **Sanders v. Lynaugh, supra** at 838. The Petitioner relies, however, on **Oregon v. Kennedy**, 456 U.S. 667 (1982), which held that the double jeopardy clause of the Fifth Amendment, applied to the states by the Fourteenth Amendment, bars a retrial

following a mistrial if the prosecutor in the first trial engaged in conduct which was intended to provoke the defendant into moving for a mistrial. This rule of law, however worthy, has no application to the facts of the instant case. In the Petitioner's first trial, his attorney did not move for a mistrial and none was granted by the trial court. Furthermore, the Petitioner has presented this precise issue to the courts of the State of Texas, and the Texas Court of Appeals has found from the evidence before it that the prosecutor did not intend to provoke a mistrial by the argument he made and that his conduct did not amount to "the functional equivalent of an intent to provoke a mistrial". **Sanders v. State**, 801 S.W.2d 955, 957 (Tex.App.--El Paso 1990). This finding by the state court

is entitled to a presumption of correctness.' 28 U.S.C. § 2254(d). Aside and apart from the statutory presumption, this Court agrees with the factual finding of the state court.

The Court has considered all of the petitioner's contentions, and finds that he is not entitled to habeas corpus relief. Therefore, the following order should be entered.

It is ORDERED that the petition for writ of habeas corpus in the above-styled and numbered cause be, and it is hereby, DENIED.

SIGNED AND ENTERED this 11th day of September, 1992.

/s/ Harry Lee Hudspeth
Harry Lee Hudspeth
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8515
Summary Calendar

D.C. Docket No. EP-91-CV-126

LEON SANDERS,

Petitioner-Appellant,

versus

LEO SAMANIEGO,

Respondent-Appellee.

Appeal from
the United States District Court
for the Western District of Texas

Before KING, DAVIS and WIENER, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

March 12, 1993

APPENDIX D

United States Court of Appeals

Fifth Circuit
Office Of The Clerk

April 6, 1993

Mr. Randy Schaffer
Attorney at Law
1301 McKinney, Ste. 3100
Houston, TX 77010

No. 92-8515 - Leon Sanders v. Leon Samaniego,
Sheriff of El Paso County, Texas

(D.C. No. EP-91-CV-126)

MANDATE STAYED TO AND INCLUDING May 6, 1993

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by

the Supreme Court on the petition for certiorari should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that court.

A copy of the opinion, judgment, or Rule 47.6 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

RICHARD E. WINDHORST, JR., Clerk

By: /s/ Marilyn A. Taylor
Deputy Clerk

Enclosures

cc: Mr. Eddie L. Martin

MDT-2

Supreme Court, U.S.
FILED
AUG 23 1993
OFFICE OF THE CLERK

No. 92-1852

In The

Supreme Court of the United States

October Term, 1993

LEON SANDERS,

Petitioner,

vs.

LEO SAMANIEGO, SHERIFF OF
EL PASO COUNTY, TEXAS,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

JAIME E. ESPARZA
District Attorney
34th Judicial District

DEBRA MORGAN
Assistant District Attorney
BAR ID # 14435510
Suite 201, City County Building
El Paso, Texas 79901
Telephone (915) 546-2059

Attorneys for the Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Respondent restates the questions presented as follows:

1. A defendant is under continuing jeopardy until his trial ends as a result of an acquittal or a finding of insufficient evidence on which the State has the burden of proof.

2. Certiorari should not be granted as prosecutorial misconduct should not be a bar to retrial unless a mistrial is declared. Further, if such applies, any conduct on the part of the prosecutor was not of a level to bar retrial, if a mistrial had been granted.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF FACTS 1

REASONS FOR DENYING CERTIORARI:

I. A DEFENDANT IS UNDER CONTINUING JEOPARDY UNTIL HIS TRIAL ENDS AS A RESULT OF AN ACQUITTAL OR A FINDING OF INSUFFICIENT EVIDENCE ON WHICH THE STATE HAD THE BURDEN OF PROOF .. 2

II. CERTIORARI SHOULD NOT BE GRANTED AS PROSECUTORIAL MISCONDUCT SHOULD NOT BE A BAR TO RETRIAL UNLESS A MISTRIAL IS DECLARED. FURTHER, IF SUCH APPLIES, ANY CONDUCT ON THE PART OF THE PROSECUTOR WAS NOT OF A LEVEL TO BAR RETRIAL, IF A MISTRIAL HAD BEEN GRANTED 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) 3, 4, 6

Delk v. Atkinson, 665 F.2d 90 (6th Cir. 1981) 3

Evans v. Court of Common Pleas, 959 F.2d 1227 (3rd Cir. 1992) 6

Ex Parte Sanders, 771 S.W.2d 645 (Tex. App. – El Paso, 1989 P.D.R.R.) 6

McNair v. Hayward, 666 P.2d 321 (Utah 1983) 3

Meraz v. State, 785 S.W.2d 146 (Tex. Crim. App. 1990) 3, 4

Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982) 7, 8, 9

Richardson v. United States, 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984) 5

Sanders v. Lynaugh, 714 F. Supp. 834 (W.D. Tex. 1988) 2, 8

Sanders v. State, 771 S.W.2d 645 (Tex. App. – El Paso, 1989 P.D.R.R.) 2, 7, 8

Sanders v. State, 801 S.W.2d 955 (Tex. App. – El Paso, 1990 P.D.R.R.) 2, 6, 8

Tibbs v. Florida, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982) 4

United States v. Becton, 632 F.2d 1294 (5th Cir. 1980), *cert. denied*, 454 U.S. 837, 102 S.Ct. 141, 70 L.Ed.2d 117 5

INDEX OF AUTHORITIES – Continued

Page

United State v. Curtis, 683 F.2d 769 (3rd Cir. 1982), *cert. denied*, 459 U.S. 1018 (1982), 103 S.Ct. 379, 74 L.Ed.2d 512 7

United States v. Haddock, 961 F.2d 933 (10th Cir. 1992) 3

United States v. Miller, 952 F.2d 866 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 112 S.Ct. 3029, 120 L.Ed.2d 900 (1992) 5

United States v. Porter, 807 F.2d 21 (1st Cir. 1986), *cert. denied*, 481 U.S. 1048, 107 S.Ct. 2178, 95 L.Ed.2d 835 (1987) 5

United States v. Rey, 641 F.2d 222 (5th Cir. 1981), *cert. denied*, 454 U.S. 861, 102 S.Ct. 318, 70 L.Ed.2d 160 5

United States v. Rios, 637 F.2d 728 (10th Cir. 1980), *cert. denied*, 452 U.S. 918, 101 S.Ct. 3054, 69 L.Ed.2d 422 (1981) 7

United States v. Singleterry, 683 F.2d 122 (5th Cir. 1982), *cert. denied*, 459 U.S. 1021, 103 S.Ct. 387, 74 L.Ed.2d 518 (1982) 7

United States v. Szado, 912 F.2d 390 (9th Cir. 1990) ...3, 5

STATUTES

Article 46.03 Sec. 1(e) Texas Code of Criminal Procedure 9

Section 8.01(a) Texas Penal Code 3

No. 92-1852

In The

Supreme Court of the United States

October Term, 1993

LEON SANDERS,

Petitioner,

vs.

LEO SAMANIEGO, SHERIFF OF
EL PASO COUNTY, TEXAS,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Leo Samaniego, Sheriff of El Paso County, Texas, respectfully requests this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case. The opinion is unpublished and is attached to Petitioner's brief, Appendix A page 1A No. 92-8515.

STATEMENT OF FACTS

On June 3, 1981, Petitioner was convicted of murder. His conviction was affirmed in the State courts but was

reversed in *Sanders v. Lynaugh*, 714 F. Supp. 834 (W.D. Tex. 1988), for improper prosecutorial argument coupled with the weak evidence of Petitioner's sanity. On remand, Petitioner filed a Writ of Habeas Corpus alleging retrial was barred because insanity was established as a matter of law at the first trial and that double jeopardy bars retrial because of the prosecutor's conduct. The lower court found against Petitioner on those issues. *Sanders v. State*, 771 S.W.2d 645 (Tex. App. – El Paso, 1989 P.D.R.R.). Once again Petitioner filed a Writ of Habeas Corpus alleging that retrial was barred because of the prosecutor's argument. In *Sanders v. State*, 801 S.W.2d 955 (Tex. App. – El Paso, 1990 P.D.R.R.) the lower court, once again, found against Petitioner on the issue. Petitioner's Writ of Habeas Corpus in the Western District of Texas was denied. See Petitioner's Brief Appendix B. Also, relief was denied by the Fifth Circuit Court of Appeals. See Petitioner's Brief Appendix A.

REASONS FOR DENYING CERTIORARI

I.

A DEFENDANT IS UNDER CONTINUING JEOPARDY UNTIL HIS TRIAL ENDS AS A RESULT OF AN ACQUITTAL OR A FINDING OF INSUFFICIENT EVIDENCE ON WHICH THE STATE HAD THE BURDEN OF PROOF.

Petitioner's argument is based on the Fifth Circuit's refusal to review the sufficiency of the evidence as to insanity before retrial in this case. In Texas, insanity is an affirmative defense which the defendant must prove by a

preponderance of the evidence. Section 8.01(a) Texas Penal Code.

The State has no burden to prove or disprove insanity. *Meraz v. State*, 785 S.W.2d 146 (Tex. Crim. App. 1990). Further, a finding that the verdict is against the great weight and preponderance of the evidence does not preclude retrial. *Id.* at 156. In Texas such a fact review ends at the appellate level.

In *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) this court found retrial barred if a case was reversed on insufficient evidence. The Government has one chance to marshall all of its evidence and seek a conviction. It is only in cases where evidence is legally insufficient that retrial is barred. The natural import of this is that a case is legally insufficient if the State fails to meet its burden of proving the elements of the offense beyond a reasonable doubt. In the cases cited by Petitioner, which allowed review of sufficiency before retrial, the Courts were looking at the State's failure to meet its burden. See *Delk v. Atkinson*, 665 F.2d 90-91, 100 (6th Cir. 1981). The *Delk* Court requires an appellate court to review sufficiency of the evidence even if reversal is based on another ground. *Id.* at 93 ftn 1. *In United States v. Haddock*, 961 F.2d 933 (10th Cir. 1992) the court reviewed the sufficiency of the evidence to support misapplication of bank funds and the elements that must be proven. But see, *United States v. Szado*, 912 F.2d 390 (9th Cir. 1990) where the court dealt with the duty of a district judge, from an appeal of a magistrate's decision, to review the evidence. In *McNair v. Hayward*, 666 P.2d 321 (Utah 1983) the issue was addressed after a mistrial was declared.

We are looking at two types of review here. First, reviewing the evidence to see if the State has met its burden and secondly, reviewing the evidence to see if defense has met its burden in proving the affirmative defense making the verdict against the great weight and preponderance of the evidence. The two reviews are mutually exclusive. *Meraz* at 153. One review is a failure of the State to meet its burden of proof, while the other is not a burden the State has and therefore has no duty to prove.

The principle of double jeopardy is that an acquittal will bar retrial. A reversal on insufficient evidence means the government's case was so lacking that it should not have been submitted to the jury. *Burks*, 437 U.S. at 16. In *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982), this Court found that retrial was not barred where a judge, sitting as a thirteenth juror, disagrees with the verdict and reverses, based on the weight of the evidence. In *Tibbs*, the court reversed on the weight rather than sufficiency of the evidence. By analogy, – should this case be reversed, it would not be reversed because the State did meet its burden of proof but rather, because the appellate court, sitting as a thirteenth juror, disagrees with the verdict, and finds it against the weight of the evidence. (Of course that has not happened in this case.) This does not mean that the case should never have been submitted to the jury. Petitioner's claim of the implications of the need to review sufficiency would not apply here because of the nature of the issue, an issue that it was not the State's burden to prove. Therefore, to allow a bar in this situation penalizes the state for the jury's non-

belief of an affirmative defense, not for its failure to meet its burden of proof.

Should this Court disagree with the foregoing reasoning, Respondent would argue that this Petitioner was still under continuing jeopardy as nothing had occurred that ended jeopardy.

In *United States v. Miller*, 952 F.2d 866, 870-74 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 112 S.Ct. 3029, 120 L.Ed.2d 900 (1992), the court held that a criminal defendant could not raise a double jeopardy claim based on insufficiency of the evidence at the original trial to bar retrial. In *Miller* insufficiency of the evidence was raised in the first appeal. *Id.* at 871. ftn 2. The *Miller* court looked to cases such as *United States v. Becton*, 632 F.2d 1294 (5th Cir. 1980), *cert. denied*, 454 U.S. 837, 102 S.Ct. 141, 70 L.Ed.2d 117, where retrial was not barred upon mistrial because of a hung jury and *United States v. Rey*, 641 F.2d 222 (5th Cir. 1981), *cert. denied*, 454 U.S. 861, 102 S.Ct. 318, 70 L.Ed.2d 160, where the court will not review sufficiency following the grant of a new trial. The court then relies on the reasoning of *Richardson v. United States*, 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984), recognizing that *Richardson* was asserting jeopardy after a mistrial, noting "but its holding is clearly not limited to such cases." *Id.* at 872. Double jeopardy will apply only if some event like an acquittal terminates the original jeopardy. No event has occurred in this case which terminated the original jeopardy. *Miller* distinguishes *United States v. Szado*, 912 F.2d 390 (9th Cir. 1990) (relied upon by Petitioner), noting that a district judge on appeal from a non-jury trial in a magistrate court has a duty to review sufficiency of the evidence. *See United States v. Porter*, 807 F.2d 21 (1st Cir.

1996), *cert. denied*, 481 U.S. 1048, 107 S.Ct. 2178, 95 L.Ed.2d 835 (1987), where the court relied upon *Burks, supra*, to find that original jeopardy had not terminated. See also, *Evans v. Court of Common Pleas*, 959 F.2d 1227 (3rd Cir. 1992). This concept balances the interests of the defendant and the interests of society in making the determination. It must be remembered that the double jeopardy clause is not an absolute bar to successive prosecutions and the bar has been held in specific situations only. For example, in *Burks*, wherein the Court specifically states retrial is not barred when the conviction is reversed on grounds other than sufficiency of the evidence. For the foregoing reasons certiorari should be denied.

REASONS FOR DENYING CERTIORARI

II.

CERTIORARI SHOULD NOT BE GRANTED AS PROSECUTORIAL MISCONDUCT SHOULD NOT BE A BAR TO RETRIAL UNLESS A MISTRIAL IS DECLARED. FURTHER, IF SUCH APPLIES, ANY CONDUCT ON THE PART OF THE PROSECUTOR WAS NOT OF A LEVEL TO BAR RETRIAL, IF A MISTRIAL HAD BEEN GRANTED.

The original trial of Petitioner did not end in a mistrial and a mistrial was never requested on the basis of the prosecutor's argument. *Ex Parte Sanders*, 771 S.W.2d 645, 650 (Tex. App. – El Paso, 1989 P.D.R.R.)

In *Sanders v. State*, 801 S.W.2d 955 (Tex. App. – El Paso 1990 P.D.R.R.) the Court adopted the reasoning of an earlier opinion by the same court, noting that when a trial

proceeds to a verdict and there is intentional overreaching by the prosecutor the defendant is benefited with two opportunities to obtain an acquittal. That Court noted there are other means to control overzealous prosecutors, and balanced the costs of such double appeals every time a case is reversed for prosecutorial error and the public interest that may be penalized. *Id.* at 957. This *Sanders* Court would not expand *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), to include a situation such as this. The Fifth Circuit has limited *Oregon* to only apply when a mistrial has actually been declared. *United States v. Singleterry*, 683 F.2d 122 (5th Cir. 1982), *cert. denied*, 459 U.S. 1021, 103 S.Ct. 387, 74 L.Ed.2d 518 (1982). In *Singleterry*, the court notes the valuable right of a defendant to try his case to a jury and the issue of the State's seeking a more favorable opportunity to convict are attenuated when a trial goes on to its conclusion. The defendant has not lost that chance for an acquittal and it's unlikely a prosecutor would lay a basis for an appellate reversal to subvert double jeopardy protections. It should be pointed out that in *United States v. Rios*, 637 F.2d 728 (10th Cir. 1980), *cert. denied*, 452 U.S. 918, 101 S.Ct. 3054, 69 L.Ed.2d 422 (1981) (cited by Petitioner), the court found the double jeopardy considerations of *Oregon* to apply when a mistrial was requested and denied. *Id.* at 729. In *United States v. Curtis*, 683 F.2d 769 (3rd Cir. 1982), *cert. denied*, 459 U.S. 1018, 103 S.Ct. 379, 74 L.Ed.2d 512 (1982), once again a mistrial was requested at trial and denied. In the case before this Court, a mistrial request was never made. This court should not extend *Oregon* to a situation where the case has a natural ending as the evil

Oregon seeks to prevent is not applicable in such a situation. Especially so, in a case such as this, where there was never a mistrial requested at trial.

Should this Court consider applying such a standard, Respondent would argue that the prosecutor's conduct never rose to the level of intentionally provoking the defendant into requesting a mistrial in this case. See *Oregon, supra.*

The court in *Sanders,* at 771 S.W.2d, noted that there was no finding by the federal judge that the prosecutorial misconduct was intentional, pointing out that the federal judge found the conduct improper but he didn't find it would bar retrial. *Id.* at 650. *Sanders v. Lynaugh,* 714 F. Supp. 834, 838 (W.D. Tex. 1988).

It was the prosecutor's improper argument coupled with the weak evidence of sanity that caused the court to reverse. *Sanders v. Lynaugh,* 838. In *Sanders v. State,* 801 S.W.2d, the court found, after a review of the evidence from a later hearing on the issue, that the prosecutor's comments did not amount to the functional equivalent of an intent to provoke a mistrial. The prosecutor testified that it was his conscious strategy to make this argument, and that he had done research in the area before making the argument. *Id.* at 957. He stated his objective was to prevent the jury from abdicating its duty and relying solely on expert testimony and that it was not his intent to violate any court order or to obtain an unfair conviction. *Id.* at 957. He had felt he had "opened the door" and the defense could then explain the argument. While the prosecutor did believe Petitioner to be insane he did not know whether he was acting under the compulsion when

he committed the murder. Contrary to Petitioner's assertion, it was not the prosecutor's intent to prevent an acquittal that the prosecutor believed was likely to occur in the absence of misconduct. In the instant case the prosecutor researched the area and his intent was to stop speculation of the jury in the area and to force them not to abdicate their duty to make the insanity determination. It should be pointed out that the statute in effect in Texas at that time did not prohibit the argument as it has since 1983. Article 46.03 Sec. 1(e) Texas Code of Criminal Procedure.

Certiorari should not be granted in this case. Petitioner never attempted to request a mistrial because of the prosecutor's argument which should be a prerequisite to arguing an extension of *Oregon*. Further, should *Oregon* be applicable, Petitioner has failed to show any misconduct by the prosecutor which was intended to provoke a mistrial request by defense.

CONCLUSION

For these reasons the court should deny certiorari.

Respectfully submitted,

JAIME E. ESPARZA
District Attorney
34th Judicial District

DEBRA MORGAN
Assistant District Attorney
Bar ID # 14435510
500 San Antonio, Suite 201
El Paso, Texas 79901
(915) 546-2059